

Message Text

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R 142138Z MAY 74

FM SECSTATE WASHDC

TO AMEMBASSY NAIROBI

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E.O. 11652: N/A

TAGS: E, FIN

SUBJECT: ATWELL DEVELOPMENT CO AND MARISHAL TEA ESTATE

REF: NAIROBI 0633

1. NOTWITHSTANDING SALE, ATWELL MAY STILL HAVE BASIS FOR EXPROPRIATION CLAIM UNDER SECTION 1.15(E) OF CONTRACT OF GUARANTY NO. 5715 WHICH DEFINES EXPROPRIATORY ACTION AS ANY ACTION WHICH IS TAKEN BY THE GOVERNMENT OF THE PROJECT COUNTRY WHICH FOR A PERIOD OF ONE YEAR DIRECTLY RESULTS IN PREVENTING "(E) THE INVESTOR FROM WITHDRAWING FROM THE PROJECT COUNTRY AMOUNTS RECEIVED IN RESPECT OF THE INVESTMENT AS INVESTMENT EARNINGS OR RETURN OF CAPITAL, WHICH ACTION COMMENCES WITHIN THE EIGHTEEN (18) MONTHS IMMEDIATELY SUCCEEDING SUCH RECEIPT;..." SALE PROCEEDS WOULD BE DEEMED TO BE RETURN OF CAPITAL UNDER CONTRACT. SECTION 1.15 OF SAID CONTRACT ALSO PROVIDES FOR AN EXCEPTION TO THIS TYPE OF EXPROPRIATORY ACTION IF SUCH ACTION OCCURS OR CONTINUES IN EFFECT DURING THE AFORESAID PERIOD, AS A RESULT OF "(6) BONA FIDE EXCHANGE CONTROL ACTIONS BY THE GOVERNMENT OF THE PROJECT COUNTRY."

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2. IF THERE EXISTS A BONA FIDE EXCHANGE CONTROL WHICH PREVENTS

ATWELL FROM WITHDRAWING ANY OF SAID PROCEEDS, HE WOULD THEN HAVE A POSSIBLE INCONVERTIBILITY CLAIM UNDER SECTION 12.01. HOWEVER, NOTE SECTION 12.01(I) WHICH REQUIRES THAT THE INVESTOR TAKE ALL REASONABLE STEPS TO EFFECT SUCH TRANSFER UNDER EXISTING LOCAL LAWS, ETC. FURTHER NOTE SECTION 12.01(II) WHICH REQUIRES THAT IN ORDER FOR LOCAL CURRENCY TO BE ELIGIBLE FOR TRANSFER THE INVESTOR MUST HAVE BEEN ABLE TO EFFECT A COMPARABLE TRANSFER UNDER THE LAWS, ET. IN EFFECT ON AUGUST 24, 1967, THE DATE THE CONTRACT WAS EXECUTED.

3. BEFORE PROVIDING EMBASSY WITH ADVICE REQUESTED REFTTEL PARA 4, OPIC WOULD APPRECIATE EMBASSY FURNISHING FOLLOWING INFORMATION:

(A) IS THERE ANY BASIS FOR DENYING TRANSFER OF ALL OR PART OF SALE PROCEEDS INTO U.S. DOLLARS UNDER PRESENT KENYAN LAW? IF SO COULD SUCH LAW BE DEEMED TO BE BONA FIDE EXCHANGE CONTROL BY GOK?

(B) WOULD ATWELL HAVE BEEN ABLE TO TRANSFER ALL OR ONLY PART OF SALE PROCEEDS INTO U.S. DOLLARS ON AUGUST 24, 1967 UNDER KENYAN LAW IN EFFECT AT THAT TIME?

4. OPIC FILES RE ATWELL CONTAIN CERTIFICATE OF APPROVED ENTERPRISE DATED MARCH 28, 1966 FOR FOREIGN INVESTMENT OF KENYAN SH 200,000. WOULD EMBASSY CONFIRM WHETHER ATWELL OBTAINED A NEW OR AMENDED CERTIFICATE OF APPROVED ENTERPRISE REFLECTING DOLLARS 100,016 OF INITIAL FOREIGN INVESTMENT FOR WHICH ATWELL OBTAINED OPIC INSURANCE.

5. PARAGRAPH 7.(B) OF KENYAN FOREIGN INVESTMENTS PROTECTION ACT 1964 PROVIDES THAT HOLDER OF CERTIFICATE MAY TRANSFER OUT OF KENYA THE APPROVED REPEAT APPROVED PROPORTION OF THE NET PROCEEDS OF SALE OF APPROVED ENTERPRISE. OPIC WOULD APPRECIATE ANY INFORMATION EMBASSY CAN PROVIDE REGARDING UNDER WHAT KENYAN LAWS AND ON WHAT BASIS "APPROVED PROPORTION" OF THE NET PROCEEDS OF SALE IS DETERMINED. UNCLEAR HOW EMBASSY ARRIVES AT DOLLARS 88,000 AS AMOUNT GUARANTEED FOR CONVERSION AND TRANSFER UNDER SAID CERTIFICATE. DECONTROL: 5/14/75. RUSH

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